

IN THE
Supreme Court of the United States

October Term 1992

CARDINAL CHEMICAL COMPANY, W.M.
QUATTLEBAUM, JR., DOROTHY QUATTLEBAUM, AND
W.M. QUATTLEBAUM, III, CARDINAL MANUFACTURING
CO., AND CARDINAL STABILIZERS, INC.,
Petitioners,

v.

MORTON INTERNATIONAL, INC.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

**BRIEF OF AMICUS CURIAE ATOCHEM NORTH
AMERICA, INC. IN SUPPORT OF PETITIONERS**

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QUESTION PRESENTED

Whether in light of *Blonder-Tongue Labs., Inc. v. University of Illinois Found.*, 402 U.S. 313 (1971), and of the cost to the parties and to the judiciary of repeated trials on technical issues of patent invalidity, the Federal Circuit vacatur of a district court's declaratory judgment of patent invalidity as moot is proper solely because the Federal Circuit has affirmed a declaratory judgment of noninfringement.

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STATEMENT PURSUANT TO RULE 29.1

Atochem North America, Inc. has three subsidiaries or affiliates other than wholly owned subsidiaries: MAF Industries, Inc.; Metco North America, Inc.; and M&T Harshaw.

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**BRIEF OF AMICUS CURIAE ATOCHEM NORTH
AMERICA, INC. IN SUPPORT OF A PETITION FOR A
WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

This *amicus curiae* brief is submitted to support the petition for a writ of certiorari. Both Petitioners (collectively "Cardinal") and Respondent ("Morton") have consented in writing to the filing of this brief.

INTEREST OF THE AMICUS

The interest of *amicus* ("Atochem") arises out of Morton's suit against Atochem charging infringement of the same two patents as are at issue in this case ("the Morton patents"). Atochem is the defendant in *Morton Int'l, Inc. v. Atochem North America, Inc.*, No. 87-60-RRM, currently pending in the U.S. District Court for the District of Delaware. Morton's action against Atochem will be significantly affected by this Court's decision on the petition.

After Atochem was sued, the Morton patents were declared invalid by two separate district courts in unrelated actions, first in Louisiana (the *Argus* case),¹ and subsequently in this case in South Carolina (the *Cardinal* case).² However, because each district court judgment also included a finding of noninfringement which the Federal Circuit affirmed, Atochem has watched the appellate court twice vacate the respective declaratory judgments of invalidity reached after trials on the merits. The second action is the subject of this petition. Morton's action against Atochem is a third separate action on the same two Morton patents.

The Federal Circuit's vacatur of the two prior district court judgments of invalidity follows that court's practice of vacating judgments of invalidity as moot when affirming judgments of noninfringement. However, as explained in Chief Judge Nies' dissent from the denial of rehearing *in banc* (Petitioners' Appendix ("PA") 18a-31a), there is no jurisdictional impediment to deciding the invalidity issue irrespective of the decision on noninfringement³ and the practice has been subject to substantial criticism.⁴

¹ *Morton Thiokol, Inc. v. Argus Chem. Corp.*, No. 84-5685 (E.D. La., June 22, 1988), *aff'd in part, vacated in part*, 873 F.2d 1451 (Fed. Cir. 1989) (nonprecedential) (Petitioner's Brief, page 3).

² *Morton Int'l, Inc. v. Cardinal Chem. Co. et al.*, No. 6:83-889-OK, (D.S.C. 1991), *aff'd in part, vacated in part*, 959 F.2d 948 (Fed. Cir. 1992), *dissent from order declining suggestions for rehearing in banc*, 1992 U.S. App. LEXIS 14519 (Fed. Cir. 1992) (Nies, C.J.).

³ As developed in the *Cardinal* petition for writ of certiorari, this Court's precedent not only permits consideration of a declaratory judgment of invalidity irrespective of the decision on infringement, but seems to mandate it. *Sinclair & Carroll Co. v. Interchemical Corp.*, 325 U.S. 327 (1945); *see also Cover v. Schwartz*, 133 F.2d 541 (2d Cir. 1942). *Amicus* Atochem's brief, however, is not directed to the jurisdictional aspect of the Federal Circuit's practice, but instead to its inconsistency with patent policy set forth by the Court and its adverse effects on the public.

⁴ *See* dissenting opinion to order declining rehearing *in banc* (Nies, C.J.). (PA 18a-31a). Also, one of the Federal Circuit panel members, Judge

A party in Atochem's position is particularly affected. Leaving the decision below undisturbed gives Morton a green light to press forward with its third lawsuit, placing Atochem in the costly and untenable position of having to defend itself against patents which have already been held invalid twice before.

Patent owners are only to be given the opportunity of one "bite at the apple" pursuant to this Court's decision in *Blonder-Tongue Labs., Inc. v. University of Illinois Found.*, 402 U.S. 313 (1971). Morton has had two bites so far, and unless the Court grants the petition in this case, yet another Morton bite is in the offing, contrary to the holding and intent of *Blonder-Tongue*.

Even Morton does not necessarily aspire to such a feast. Morton itself asked the Federal Circuit to decide its appeal on the merits and subsequently asked for a rehearing *in banc*. Atochem's interest, and perhaps Morton's interest as well, is clear. The cost of still another trial for the parties and the public is too high for the Federal Circuit to again avoid ruling on Morton's appeal of the district court's holding of invalidity of the Morton patents. Accordingly, and for the reasons set forth further below, *amicus* respectfully requests that the Court grant *Cardinal's* petition for writ of certiorari, exercise its supervisory authority over the Federal Circuit, and remand this case to the Federal Circuit with instructions that the declaratory judgment of invalidity be reinstated and the appeal of that judgment be decided on the merits.

QUESTION PRESENTED

Whether in light of *Blonder-Tongue Labs., Inc. v. University of Illinois Found.*, 402 U.S. 313 (1971), and of the cost to the parties and to the judiciary of repeated trials on technical

Lourie, would have affirmed the judgment of invalidity of the Morton patents and not reached the issue of whether *Cardinal's* specific products infringe those patents. (PA 11a-15a).

issues of patent invalidity, the Federal Circuit vacatur of a district court's declaratory judgment of patent invalidity as moot is proper solely because the Federal Circuit has affirmed a declaratory judgment of noninfringement.

SUMMARY OF THE ARGUMENT

The Federal Circuit's practice of vacating a declaratory judgment of patent invalidity as moot solely because the Federal Circuit has affirmed a declaratory judgment of noninfringement is contrary to the spirit of this Court's decision in *Blonder-Tongue*. The *Blonder-Tongue* decision was intended to prevent patentees from relitigating patents once held invalid in a full and fair trial. The Federal Circuit's practice of declining to review district courts' holdings of invalidity permits "repeated litigation of the same issue as long as the supply of unrelated defendants holds out," despite a full and fair trial on the validity issue — a result which the *Blonder-Tongue* decision was expressly designed to avoid. 402 U.S. at 338.

The encouragement of "repeated litigation" is the real effect of the Federal Circuit's practice. It is not hypothetical. The Morton patents have been declared invalid twice after lengthy and complex trials on highly technical chemical subject matter. Nonetheless, Morton may seek a third trial on these patents in a different jurisdiction, Delaware, involving Atochem, a defendant unrelated to the defendants in either the Louisiana *Argus* case or the South Carolina *Cardinal* case.

Not only will there be a high cost of the pretrial discovery and trial of a third action on the Morton patents, as is typical of patent cases, but it is clear that judicial resources will not have been conserved by Morton's continued enforcement of its invalid patents. These consequences sought to be prevented by this Court in *Blonder-Tongue* flow directly from the Federal Circuit's vacatur of the invalidity judgment simply because the Federal Circuit chose to decide the issue of noninfringement before invalidity. It should have taken the issues in the opposite order.

Cardinal's petition in this case presents the ideal opportunity for this Court to review and pass judgment on the propriety of the Federal Circuit's routine practice of vacating judgments of patent invalidity where noninfringement is sustained. That is the only issue before the Court. There is no need to consider any of the technical aspects of the patent issues.

For the reasons given herein, it is respectfully requested that the petition for writ of certiorari be granted.

REASONS FOR GRANTING THE PETITION

I. This Court Should Exercise Its Supervisory Authority Over the Federal Circuit to Ensure that the Rationale of the *Blonder-Tongue* Decision is Given Full Effect

In the *Blonder-Tongue* decision, this Court abrogated the doctrine of mutuality set forth in *Triplett v. Lowell*, 297 U.S. 638 (1936), to prevent a patent owner from relitigating patents once held invalid against other unrelated defendants. The Federal Circuit's established practice of vacating judgments of invalidity upon affirming corresponding judgments of noninfringement vitiates that very purpose because the practice permits "repeated litigation of the same issue as long as the supply of unrelated defendants holds out," a result which *Blonder-Tongue* expressly sought to prevent. 402 U.S. at 329. Therefore, the effect of the Federal Circuit's practice is in conflict with the precedent of this Court.

Since the Federal Circuit has exclusive jurisdiction over patent matters, there is no conflict among the circuits. However, certiorari is clearly appropriate where, as here, the circuit court's decision conflicts with a policy set by this Court. *Exhibit Supply Co. v. Ace Patents Corp.*, 315 U.S. 126, 128 (1942). Moreover, the exercise of supervisory authority over the Federal Circuit is particularly important because the exclusive jurisdiction of the Federal Circuit in patent appeals makes it the patent court of last resort, for all practical purposes. The

Federal Circuit will continue its practice of resuscitating through vacatur patents found invalid by a trial judge or jury, until this Court orders otherwise.⁵

The Cardinal petition for certiorari should be granted so that the Court can exercise its supervisory authority and ensure that patent invalidity determinations after full and fair trials are resolved at the appeal stage without the need for further litigation to prove invalidity all over again.

II. Under the Rationale of the *Blonder-Tongue* Decision, Invalidity Should Be Heard and Decided Upon by the Federal Circuit

In *Blonder-Tongue*, the Court criticized repeated litigation where the patent has been once found to be invalid. The Court held that:

Permitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table or "a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure."

402 U.S. at 329, quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 185 (1952).

The Court also noted the unfairness to the defendant faced with having to litigate an issue already decided:

In any lawsuit where a defendant . . . is forced to present a complete defense on the merits of a claim

⁵ As Chief Judge Nies wrote:

The question of how a judgment of invalidity on a declaratory claim should be treated after a finding of no infringement is too important in my view to let pass again. The parties can now look only to the Supreme Court for correction.

Opinion dissenting from order declining of rehearing *in banc*. (PA 31a).

which the plaintiff has fully litigated and lost in a prior action, there is an arguable misallocation of resources. To the extent the defendant in the second suit may not win by asserting, without contradiction, that the plaintiff had fully and fairly, but unsuccessfully, litigated the same claim in the prior suit, the defendant's time and money are diverted from alternative uses—productive or otherwise—to relitigation of a decided issue.

Id. at 329.

With respect to relitigating patent invalidity, the Court concluded that "[w]hatever legitimate concern there may be about the intricacies of some patent suits, it is insufficient in and of itself to justify patentees relitigating validity issues as long as new defendants are available." *Id.* at 334. The Court then focused on three bases in deciding that mutuality of estoppel should be abrogated and a patentee precluded from relitigating the validity of a patent once a district court has declared it to be invalid. These bases were: (1) fairness to the patentee in getting an opportunity to present all relevant and probative evidence before the district court in the first litigation; (2) economic costs of continued litigation of an already held invalid patent; and (3) burden on the federal courts in permitting patentees to relitigate patents held invalid. *Id.* at 338.

A. No Unfairness Inures to the Patentee in Deciding Invalidity

If the fairness of the trial is challenged by the patentee, it could conceivably be an issue for subsequent district court litigation, but it presumably would be an issue on appeal to the Federal Circuit. Indeed, this Court appears to have assumed in *Blonder-Tongue* that a full and fair opportunity includes appellate review of the judgment of invalidity.⁶ It is thus important

⁶ E.g., *id.* at 339-40, quoting from President's Commission on the Patent System Report, page 39.

for the Federal Circuit to consider and decide the appeal of the judgment of patent invalidity.⁷

B. The Cost of a Third Trial is High

The Court also examined the economic consequences.⁸ The Court noted that it was an "acknowledged fact" that patent litigation is a very costly process. In addition, the Court considered that patent defendants have higher costs than patent owners since defendants must both introduce proof to overcome the presumption of validity and must attempt to rebut whatever proof the patent owner offers. *Id.* at 335. Moreover, repeated litigation raising the same issue and involving much of the same proof imposes "high costs" on the individual parties.⁹ The Federal Circuit's practice of vacating judgments of invalidity leads to relitigating the same validity issue that previously was decided and was dispositive, and runs counter to this basis of the *Blonder-Tongue* decision.

C. A Heavy Burden on the Judiciary Results

Third, the adverse effect of repeated litigation on judicial resources was another basis for the conclusion reached in *Blonder-Tongue*. *Id.* at 348-349. The burden on the judicial

⁷ Morton appealed the holding of invalidity in both *Argus* and *Cardinal* and sought a decision by the Federal Circuit on invalidity. In what must be an unusual scenario, both Morton and Cardinal petitioned the Federal Circuit for rehearing *in banc*, arguing that the Federal Circuit should not vacate, but rather should reach invalidity. Morton is supporting Supreme Court review here, for different reasons.

⁸ *Id.* at 334-348. The Federal Circuit has itself cited with approval the economic consequences analysis in *Blonder-Tongue*. *Dana Corp. v. NOK, Inc.*, 882 F.2d 505 (Fed. Cir. 1989).

⁹ *Id.* at 338. Another economic consequence thought by the Court to be even "more significant" is that potential defendants will often decide that paying royalties under a license or other settlement is preferable to the costly burden of challenging the patent. *Id.* at 338.

system of repeated trials on the same complex technical and patent law issues that were resolved against the patent owner a first time is even more important a factor today as the volume of litigation in the federal courts has soared.¹⁰ The Federal Circuit's practice adds to the burden on the district courts who may spend substantial court time trying the validity issue only to have their work expunged by an appellate court.¹¹

The appellate courts' caseload, including the caseload of this Court and of the Federal Circuit, is also at a crisis point.¹² As this case itself demonstrates, the Federal Circuit's practice inevitably leads to more district court litigation as well as to more appeals. At a time when conservation of judicial resources as envisioned by *Blonder-Tongue* is sorely needed, this Court should review the Federal Circuit's practice because it adds to the congestion in the courts instead of reducing it.

The Court in *Blonder-Tongue* held that it was no longer tenable to afford a patent owner more than one full and fair opportunity for judicial resolution of the issue of patent inval-

¹⁰ The current caseload crisis and its impact are well recognized. See, e.g., *Report of the Federal Courts Study Committee*, Administrative Office of the United States Courts (April 2, 1990) and S. Rep. No. 416, 101st Cong. 2nd Sess. (1990), reprinted in 1990 U.S.C.C.A.N. 6802, to *The Civil Justice Reform Act of 1990*.

¹¹ Recently, the district court in *Wang Labs. Inc. v. Toshiba Corp.*, 1992 WL 16914, page 2, Civ. A. 90-1477A (E.D. Va. 1992), expressed its concern that vacating the lower court's finding of invalidity without reviewing the merits at the request of parties who settle the case while the appeal is pending, a related standard practice of the Federal Circuit, may result in an invalid patent being "foisted off on the public and left to distort the market." See also opinion dissenting from order declining rehearing *in banc* (Nies, C.J.). (PA 31a).

¹² See *Report of the Federal Courts Study Committee*, *id.* at note 10, page 109 *et seq.* (chapter entitled "Dealing with the Appellate Caseload Crisis").

idity. 402 U.S. at 312-313. In 1971, when *Blonder-Tongue* was decided, judgments of both invalidity and noninfringement were routinely reviewed together by the appellate courts. It was not until 1987, when the Federal Circuit adopted this practice,¹³ that there was any suggestion that an appellate court's holding of noninfringement rendered the issue of invalidity moot.¹⁴

Indeed, as between issues of validity and infringement, the better practice has been considered by this Court to be to inquire fully into validity, and not to dispose of the suit without going into the question of validity.¹⁵ Moreover, fairness to the defendant, the high economic costs and judicial burden of multiple trials, and the public interest in identifying invalid patents, all support the principle of *Blonder-Tongue* that patentees should not be able to relitigate invalid patents after a full and fair trial on the validity issues.

The Federal Circuit's practice is 180° out of phase with these basic principles. It ignores the importance to the public of a complete determination of the validity of a patent, and it

¹³ The Federal Circuit's practice began with two decisions issued on the same day. *Vieau v. Japax, Inc.*, 823 F.2d 1510, 1517 (Fed. Cir. 1987); *Fonar Corp. v. Johnson & Johnson*, 821 F.2d 627, 634 (Fed. Cir. 1987), cert. denied, 484 U.S. 1027 (1988).

¹⁴ Before the Federal Circuit's adoption of its practice, it also routinely reviewed judgments of invalidity before or in conjunction with judgments of noninfringement. See, e.g., *Mannesmann Demag Corp. v. Engineered Metal Prods.*, 793 F.2d 1279 (Fed. Cir. 1986).

In fact, judgments of invalidity were routinely reviewed *first*, perhaps because it was commonly thought that an invalid patent cannot be infringed. See *Spectra-Physics, Inc. v. Coherent, Inc.*, 827 F.2d 1524 (Fed. Cir.), cert. denied, 484 U.S. 954 (1987).

¹⁵ *Sinclair & Carroll Co.*, supra, 325 U.S. at 330 ("validity has the greater public importance"). See also *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 488-9 (1974); *Lear, Inc. v. Adkins*, 395 U.S. 653, 663-4 (1969); *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 816 (1945); *Pope Mfg. Co. v. Gormully*, 144 U.S. 224, 234 (1892).

encourages, rather than prevents, the relitigation of the issue of invalidity after a patent is once held invalid. Given the precedent, policy, and underlying rationale of *Blonder-Tongue*, and the incongruousness of the Federal Circuit's practice of vacating invalidity judgments where infringement is not found, the Supreme Court should grant certiorari in this case and address the Federal Circuit practice.

III. The Petition Presents an Ideal Opportunity to Decide the Issue

The present case presents an ideal opportunity for deciding this fundamental issue of patent practice.

First, evaluation of the Federal Circuit's practice of vacating judgments of invalidity is the only issue raised by Petitioners and *amicus*. No evaluation of technology will be necessary.

Second, the harm to unrelated defendants is real. Unlike unidentified potential defendants against whom Morton's two patents may or may not be asserted if the judgment of invalidity remains unreviewed, Atochem has been sued by Morton.

Third, there have been two prior judgments of invalidity of the Morton patents. Atochem should not have to face patents that have twice been held invalid.

Fourth, as can be seen from the decisions below, the Federal Circuit's practice is very well-established. Thus, it is not likely to change.

Evaluation of the Federal Circuit's practice is now abundantly ripe for review.

CONCLUSION .

This Court should grant Petitioners' request for a writ of certiorari to review the Federal Circuit's practice of routinely vacating declaratory judgments of invalidity solely upon affirming declaratory judgments of noninfringement.

Respectfully submitted,

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